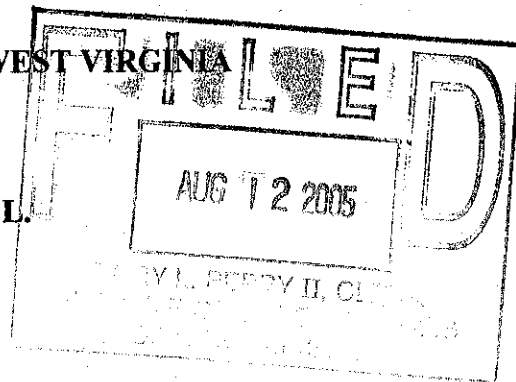


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 32703

IN RE: THE ADOPTION OF JON L.



FROM THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA

RESPONSE TO APPELLANTS' BRIEF

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August 10, 2005

within four months of the filing of the transcript. The appeal was filed March 22, 2005. Therefore, this appeal should be denied.

Appellants argue that the appeal was timely filed under *W.Va. Code § 48-22-704*, which states that an adoption order may not be vacated on any ground if the petition to vacate is filed more than six months after the date the order is final. In this case, the Appellants do not seek to have the adoption order vacated. Rather, Appellants seek to have the name change decision reversed and remanded. Therefore, *§ 48-22-704* does not apply to this case and the Petition for Appeal was not timely filed.

However, should the Court not grant this relief, Appellees' respectfully submit the following arguments in response to Appellants' brief.

The sole issue before this Honorable Court is whether the Circuit Court erred in denying the Appellants' name change request.

Appellants argue that the Circuit Court erred in refusing to change the child's surname at the time of adoption to that of his adopting father. Appellants support this argument with adoption statutes and cases that are mostly irrelevant to the issue before this Court. The underlying adoption, nor Grandparent visitation is at issue. The only issue is the denial of the request to change the name of Jon L. to Jon A.

Appellants first argue that there is a significant difference between an adoption proceeding and a name change proceeding in terms of the severing of familial relationships and the privacy aspect of adoption in contrast of the public knowledge of a name change. Appellants cite numerous statutes and case authorities to support this claim. Appellees agree with this statement, and the supporting authorities, that the adoption process is a private one that severs ties to a prior family and creates ties to new

Argument and Discussion of Law

First, it is still Appellees' contention that the Petition was not timely filed. The Final Order in the adoption case, which is the subject of this appeal, was signed by the Honorable David Nibert, Circuit Court Judge of Roane County, West Virginia, and entered on September 24, 2004. This appeal was filed on March 22, 2005, nearly six (6) months after the Final Order was entered.

Rule 3 of the Rules of Appellate Procedure (2004) states:

No petition shall be presented for an appeal from, . . . , any judgment, decree or order, which shall have been entered more than four months before such petition is filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered, whether the State be a party thereto or not; provided that the judge of the circuit court may for good cause shown, by order entered of record prior to the expiration of such period of four months, extend and re-extend such period, not to exceed a total extension of two months, if a request for the transcript was made by the party seeking an appeal or supersedes within thirty days of the entry of such judgment, decree or order.

Counsel inquired as to whether Petitioner requested an extension of time or if a request for the transcripts was made. Based on all of the information available, there was no request for an extension of time to file this appeal. Likewise, there was no request made for transcripts in preparation of this appeal. Therefore, this appeal was not timely filed as required by the Rules of Appellate Procedure.

Counsel is informed and verily believes that a copy of the transcript was lodged in the file on November 17, 2005. Therefore, if this honorable Court deems that a request for the transcript was made in a timely fashion, despite the lack of a written request and a corresponding order, the appeal should still be dismissed because it was not filed even

Points and Authorities Relied Upon

West Virginia Statutes:

W.Va. Code § 48-22-101 *et seq.* (2004)

W.Va. Code § 48-22-704 (2004)

W, Va. Code § 48-25-101 *et seq.* (2004)

W.Va. Code § 48-10-902 (2004)

West Virginia Rules of Appellate Procedure Rule 3 (2004)

West Virginia Cases:

Clifford K. and Tina B. v. Paul S., (no. 31855), June 17, 2005

In Re: Grandparent Visitation of Cathy L. (R.) M v. Mark Brent R. et al., (No. 31864), May 11, 2005

In Re: Thomas, 416 S.W.2d 52 (Mo. App. 1967)

Lazow v. Lazow, 147 So.2d 12 (Fla. App. 1962)

Luft v. Luft, 188 W.Va. 339, 424 S.E.2d 266 (1992)

Petition for Change of Name of Harris to Struble et al., 160 W.Va. 422, 236 S.E.2d 426 (1977)

State ex rel. Smith V. Abbot and King, 187 W. Va. 261, 418 S.E.2d 575 (1992)

United States Supreme Court Case:

Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)

RESPONSE TO APPELLANTS' BRIEF

Proceeding and Opinion Below

This appeal is from the Final Order of Roane County Circuit Court granting the adoption of Jon L., but denying the motion to change Jon L.'s name to Jon A., the surname of the adopting father. Petitioners' motion to change the child's name was made in the Petition for Adoption and the Court denied the motion during the adoption proceeding. The relevant portion of that Final order states as follows:

The Court then considered the motion of the petitioner to change the child's name to JON C[.] A [.] , or alternatively, to JON L[.] A[.] .

Considering the objection of the paternal grandparents, the Court FINDS that the proposed change of the child's name would not significantly advance his interests, and if the child wishes to change his name, he can do so as an adult. Therefore, it is ADJUDGED, DECLARED, and ORDERED that from this time forward said child's name shall remain be (sic) JON C[.] L[.] , to which ruling the petitioners did OBJECT.

Final Order, page 5.

It is this ruling the Appellants now appeal.

Statement of the Case

The Appellees, Robin and Janet Lyons, agree with Appellants' Statement of the Case.

family; whereas, a name change petition is very public and contains less familial consequences. However, Appellees strongly disagree that this name change issue should be decided under adoption statutes and case law. It should be decided under the terms and conditions of the name change statutes and case law, since is it just that, a name change issue.

Appellants argue that the name change of the child falls under the adoption statute based on the language of W.Va. Code § 48-22-703 (2004), which states that the child and his or her birth parents are divested of the legal rights which existed prior to the adoption, with the exception being that of the right to visitation by the child's grandparents if the adopting parent is a stepparent, grandparent, or other relative of the child, W.Va. Code § 48-10-902 (2004), and W.Va. Code § 48-22-702 (2004), which states that the adoption order is required to state the "name by which the child is thereafter to be known."

In the instant case, the birth parents, Melissa A., formerly Melissa L., and Jonathon Kelli L. are not divested of the legal rights to Jon L. because Melissa A. consented to the adoption of her son Jon L. by her new husband, Warren A., and the birth father, Jonathan Kelli L., is deceased. The legal rights of the Appellees, the paternal grandparents, to visitation of Jon is not divested because the adopting parent is a stepparent. Therefore, the Appellees retain the right to visitation with Jon and remain the only tie to his late birthfather.

The Circuit Court, as stated above, is required in the adoption order to state the name by which the child will be thereafter known. *Id.* In this case, Appellants made the motion for name change in the Petition for Adoption instead of using the appropriate procedures under the name-change statutes, W.Va. Code § 48-25-101 *et seq.* (2004).

Therefore, the Circuit Court ruled on the name change motion at the adoption hearing and denied the same in the final order. Appellants argue that the Circuit Court erred in denying the name change because the ruling was made pursuant to the name-change statutes and case law instead of the adoption statutes and case law.¹ However, this argument fails because the adoption statutes and case law do not require a change in the adopted child's name to that of the adopting parents. The law only states that the order is to reflect the name in which the child will be thereafter known. W.Va. Code § 48-22-702 (2004). No other statute or case cited by Appellant requires the Court to change the name of the child upon adoption, even where the motion is made by a birth parent consenting to the adoption. The Circuit Court considered Appellants' motion and denied the same. Under the adoption statute, the Circuit Court was merely required to reflect the child's name post-adoption, and the Order complies by naming the child Jon L.

As stated above, this is a name change issue and the name change statutes should apply. Appellants did not use the procedures for the name change. Had they used the appropriate procedures, the Petition for Name Change would have been publicized in the local newspaper and any person having a reason why the name should not be changed could appear to object to that change. W.Va. Code § 48-25-102 (2004). Appellants argue that the Appellees should not have been given the opportunity to object because they are grandparents and their consent is not needed. However, since the Appellants did not use the proper procedure for the name change, had the Appellees not been given the statutorily required notice of the adoption, under the Grandparent Visitation laws, no one would have known the motion to change the child's name was made.

¹ Appellants argue that the name change case law does not apply, yet they use that case law to support their position that the child's name should have been changed.

The Court properly ruled that changing the child's name "would not significantly advance his interest." Appellants argue that under the name change case law, which they deny should apply but yet recite, the name should be changed for simplicity and continuity and to advance the child's best interest. *Petition for Change of Name of Harris to Struble, et al.*, 160 W.Va. 422, 236 S.E.2d 426 (1977); *Lufft v. Lufft*, 188 W.Va. 339, 424 S.E.2d 266 (1992); *State ex rel. Smith v. Abbot and King*, 187 W.Va. 261, 418 S.E.2d 575 (1992). The Appellants argue that Jon's name should be changed so that the family does not have to explain why Jon has a different last name than his family; that the child should bear Warren A.'s surname for custom and usage in society; as stated in *Harris*, supra, and that the name should be changed for continuity and simplicity, as stated in *Lufft*, supra. However, the Appellants misuse these cases in support of their argument.

In *Harris*, supra, the Court held that "Children bear the surnames of their fathers by custom and usage in this society, and where a father who has exercised his rights and discharged his parental responsibilities is dead, . . . , the name of a minor child cannot be changed from that of the father unless upon proper notice and by clear, cogent, and convincing evidence it is shown that such change will significantly advance the best interests of the child. *Id.*, *Syl. Pt. 3*. The court explained that where a father exercised his parental rights in any way before he died, the evidence must be far stronger with regard to benefits of a name change than that of a father who had abandoned all rights. *Id.* at 160 W.Va. 426, 236 S.E.2d.429. It further explained that "[A] father's interest in having his children bear his name is a valuable and protectable interest, although it is not a property right nor such interest as cannot be taken away from the parent, if the best interest of the child will be served." *Id.* Further, the record must affirmatively show that the child's

welfare would be served by changing his name to one other than his father's. *Id.*, quoting *Lazlow v. Lazlow*, 147 So.2d 12 (Fla.App.1962)(holding that "To change the name of a minor son so that he no longer bears the father's name is a serious matter, and such action may be taken only where the record affirmatively shows that such change is required for the welfare of the minor. Society has a strong interest in the preservation of the parental relationship. . ."). More importantly, the *Harris* court held that "mere convenience or dislike on the part of the guardian or child of his surname is an insufficient reason for a change where the father has exercised his rights." *Id.* at 160 W.Va. 428.

The *Lufft* court reinforced *Harris* by adding that "Looked at from the child's standpoint, there is a presumption that [name] change is detrimental and must be justified. *Lufft*, at 188 W.Va. at 343, 424 S.E.2d at 270.

This Court's prior decisions are consistent with that of other states. *See In Re: Thomas*, 416 S.W.52 (Mo.App.1967) (holding that the father cannot be arbitrarily deprived of his right to have his child use his name unless it is in the interest of the child that such change be made.), and *Lazlow*, supra.

First, the Appellants admit that before his untimely death, Jonathan L. was exercising his parental rights with Jon L., thereby requiring clear, cogent, and convincing evidence that the name change will *significantly* advance the best interest of the child. The Appellants do not, however, state any facts showing how changing the child's name would significantly advance his best interest. There is no claim that the last name A. would benefit the child in the future. Warren A. is not a prominent, well-known man in the area, nor is his wealth a benefit to the child in receiving special treatment or being considered for future jobs or schools. Therefore, other than it being easier on the

Appellants to change the child's name so as not to have people question the difference in names of the siblings, there is no benefit or advance of changing the name. Moreover, *Harris* makes clear that the mere dislike of the surname is not enough to support the change in name.

The Appellants also neglected to state that this child is the sole issue of Jonathan Kelli L., who is now deceased, and fails to take into consideration the impact a name change would have on the family and the child in the future. The L. surname and the Appellees are the only remaining ties to the child's father. Further, since the child was the sole issue of Jonathan L., and a male, the child is the only remaining person to carry on the family name and bloodline. Even though it may be more simple for the Appellants to change Jon L.'s name, the impact on Jon was not considered. Further, the Appellants cannot overcome the presumption that the name change is detrimental. There simply are no facts to support the justification of the name change.

The Appellants cite *State ex rel. Smith, supra*, to support the name change because of continuity and simplicity. However, that court found that the adopted child had been using the adopted name for quite some time and for the sake of continuity and simplicity, the child should keep the adopted name. In that case, however, the birth mother's parental rights had been terminated and the birth father was not exercising his parental rights at the time of adoption. Furthermore, the birth parents did not object to the name change when the adopting mother originally moved the court for the change. As stated above, that is simply not the facts in the case *sub judice*. Jonathan L. exercised his parental rights prior to his death and would object to his child's name being changed, as has been done through his parents, the Appellees.

Appellants have failed to state sufficient justification to change the child's name and the lower court's ruling should therefore be upheld.

The Appellants next argue that the court erred in sustaining the objection of the Appellees to the name change because they are grandparents and only afforded the right to notice of the adoption and not the right to consent to the adoption.² They argue that the lower court elevated the rights of the Appellees from notice to consent. Again, the Appellants argue adoption law when that simply is not an issue before this Court.

Appellees concede that under the adoption statutes, they are only afforded notice of the adoption proceeding since they are the paternal grandparents. However, the objection to the change of the child's name was not made under the adoption statutes. It was made under the name change statutes, which afford any person the right to object if that person have such reason to believe an injury would occur from the change in name. W.Va. Code § 48-25-102 (2004).

Appellants cite *Clifford K. and Tina B. v. Paul S.*, No. 31855, June 17, 2005, in support of the position that Appellees' rights are not "on par" with the birth mother's right to change the name. However, that case solely deals with the rights of custody of a child. It does not consider a change in name. In *Clifford K. and Tina B.*, a lesbian life partner was seeking custody of her deceased partner's child. The deceased partner's parents were also seeking custody. The life partners were in an automobile accident and while Tina B. was recovering, the maternal grandparents were given custody of the child. After Tina B. recovered, she eagerly awaited the return of the child to return caring for his every need as she had done since birth. The Court held, "While we applaud the efforts of the maternal grandparents of Z.B.S. to secure his guardianship upon his

² W.Va. Code § 48-22-601 (a) (5) (2004).

mother's death to ensure that his care, custody, and control would not be left to chance, their rights to and relationship with Z.B.S., while significant and substantial, simply are not on par with those of Tina B. under the facts and circumstances of this case." The court was simply saying that Tina B. was a second mother to the child and had cared for that child since its birth. Therefore, her rights to custody were more substantial than the grandparents, who had not been as much a caretaker as Tina B. Therefore, the Appellants' argument that Appellees' rights are not "on par" with those of Appellants' rights, is simply taken out of context and misused.

Appellants then recite the issues and case law of grandparents' rights, which are not at issue here. However, Appellees feel obligated to respond to the arguments as stated.

Appellants first argue that this case is similar to *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). In *Troxel*, a Washington statute granting any person the right to petition for visitation at any time, and authorizing the state superior courts to grant such rights whenever it would serve the best interests of the child, was struck down because it violated a parent's due process right to raise a child and make decisions concerning care, custody, and control of the child. The Court determined that the statute was not unconstitutional because the state was allowed to intervene; it was unconstitutional because it intervened without regard to a mother's determination of her daughters' best interests. In that case, a grandparent petitioned for visitation rights with her deceased son's children. The birthmother did not object to visitation; she objected to the amount of visitation the court ordered. She appealed and the Supreme Court held that the statute was unconstitutional because it allowed a judge to override a parent's decision

on what was best for the child in terms of visitation. The lower court overstepped its bounds by ordering such amount of visitation. This case solely deals with grandparent visitation and the right for a parent to decide who may visit the child and when.

Appellants argue that in the case *sub judice*, the lower court required the A.s to disprove that the name change would not be in the best interest of the child, and that the lower court substituted his judgment for the judgment of the birthmother. They argue that based on this Court's opinion in *In Re: The Grandparent Visitation of Cathy L. (R.) M. v. Mark Brent R. et al.*, No. 31864, May 11, 2005, (holding that the constitutional admonitions of *Troxel* be observed and that the parents' decision as to the best interests of the child be given significant weight.) However, these cases deal solely with visitation and the right of a parent to decide who visits with the child and how much visitation is in the best interest of the child. That just simply is not the circumstances of this case.

This case is about changing a name of a child. The Appellants have set forth no grounds showing that the child's best interests would be served by the name change. Moreover, the court gave weight to the parents' motion to change the name. The court was not overstepping the parent's rights to custody and control of the child; there was simply no evidence that the name change would advance the child's best interest. The lower court allowed the Appellees to state their objections to the adoption and/or the name change and then excused them from the hearing. Appellees were not afforded the "right to veto the parents' decision;" they were simply objecting to the name change, as allowed under the name change statute. The lower court adopted the birthmother's decision of adoption as in the best interest of the child, and declared the child adopted by Warren A. There is simply no case law that requires a court to adopt every decision a

parent thinks is in the child's best interest. Here, the lower court did not believe the name change would substantially advance the child's best interest, and denied the name change.

Therefore, the lower court's ruling was proper and should be upheld.

Prayer for Relief

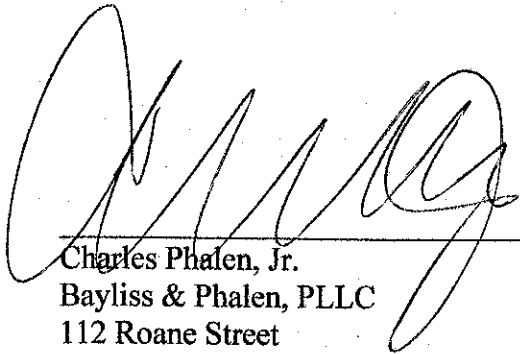
The Appellees respectfully pray that this Court uphold the Circuit Court of Roane County's ruling in this matter and allow the child's name to remain Jon C. L.

Respectfully Submitted,

Robin and Janet Lyons,

Appellees,

By Counsel



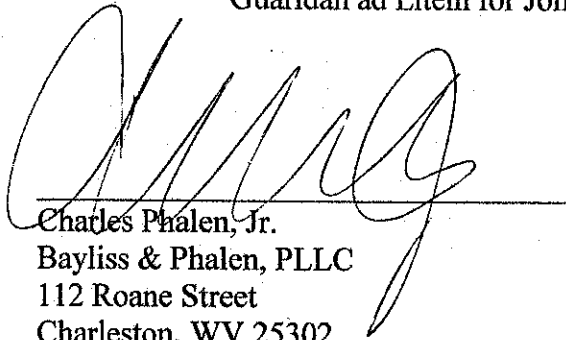
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CERTIFICATE OF SERVICE

I, Charles Phalen, Jr., counsel for Appellees, Robin and Janet Lyons, do hereby certify that I have served a true copy of the forgoing "Response to Appellants' Brief" upon the interested parties to this case by mailing the aforesaid Motion, on this the 11th day of August 2005, postage prepaid, to the following:

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